United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

ORIGINAL

76-4165

United States Court of Appeals
FOR THE SECOND CIRCUIT

STATE INSURANCE FUND
AND GUARDINO & SONS,

Petitioners,

v.

CATHERINE PESCE, and DIRECTOR OFFICE OF WORKERS
COMPENSATION PROGRAMS,

Respondents.

BRIEF FOR PETITIONERS

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249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

TABLE OF CONTENTS

CASES CITED

MISCELLANEOUS

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Statement

This is a petition for review by the State Insurance Fund and the employer, Guardino and Sons, from an order of the Benefits Review Board (hereinafter referred to as the Board), dated May 28, 1976, which affirmed the decision and order of the Administrative Law Judge Garvin Lee Oliver, dated October 21, 1975. Said decisions held that a death from causes unrelated to an accidental injury in the instance of permanent total disability entitles a widow to the death benefit provided for in Section 909, 33 U.S.C. as amended.

Question Presented

1. Whether the death benefit, created by the 1972 amendment to the Longshoremen's and Harbor Workers' Act (LHCA) 33 U.S.C. 909, is applicable to a claim predicated upon an injury sustained prior to the effective date of such

amendment; which injury resulted in permanent total disability prior to the 1972 amendment and the ensuing death, after the date of the amendment was not in consequence, directly or indirectly, of the original injury.

Summary of Argument

1. The 1972 amendments to 33 USC 909 are not retroactive or retrospective in application because there is a substantive change in the law and cannot be deemed to have application to events happening prior to the effective date of such amendments.

Agreed Statement of Fact

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C., 20210

[SAME TITLE]

Decedent injured his back on July 20, 1961. He never returned to gainful employment. A compensation order dated February 2, 1972 was issued on the basis of a Permanent Total disability for the period 7-15-61 to 1-28-72 at $70.00. An additional order was issued on June 2, 1972 directing payments of benefits to the decedent (then alive) from 1-29-72 to 2-25-72 at $70.00.

Payments were thereafter made to the decedent until 10-14-73, the date of death.

On December 6, 1973 Claims Examiner Buckberg noted the decedent's demise and directed payments to the widow, Catherine Pesce from 10-14-73 at the rate of $70.18 equaling 50% of the national weekly wage, of $140.36 per Sec-

tion 9 of the Act. An order was issued to that effect which order also determined that this was an automatic death case.

BEC 207 was filed in conjunction with this order and the Employer and Carrier contended that Section 9, 10F and 10G of the Act should not be applied.

Thereafter on June 20, 1974 after a Pre-trial Conference a similar order directing a continuance of payments at the rate of $70.18 and a funeral benefit of $1,000.00 to the widow.

BEC 207 was filed in conjunction therewith on June 26, 1974.

The date of death, the widow's status and her relationship to the decedent were not contested.

The only issue is whether the Act as amended applies to the Instant Claim since this accident occurred in July 14, 1961.

PAUL GRITZ
Attorney for Claimant

JOSEPH F. MANES for
Herbert Lasky
General Attorney
State Insurance Fund
Attorney for Employer
and
Carrier

POINT I

A new right to benefits for death not causally connected to an accident occurring prior to the amendments of 1972, should not, in the absence of a clear statement of legislative intent, be applied retroactively or retrospectively.

It would appear that the words retroactive and retrospective are interchangeable and synonymous. Such are deemed to relate back to a previous transaction and give it a different legal effect from which it had under the law when it occurred. (CJS—Constitutional Law Sect. 414.)

Such a law is constitutionally objectionable in that it impairs vested rights and obligations mandated by existing law; or creates a new liability; imposes a new duty or attaches a new disability with respect to transactions or considerations already past.

The Federal Constitution and many State Constitutions contain no express prohibition against laws which are retrospective in application.

Consequently, a law is not invalid merely because it may operate retrospectively or retroactively.

> *Cohen* v. *Beneficial Industrial Loan Corp.*, 69 S.Ct. 1221, 337 U.S. 541.

Its validity must be tested by ascertaining whether there is some fundamental or constitutional objection, retrospectivity aside.

The viability of a retrospective statute is determined by its effect.

In the instant matter it is the creation of a new right to benefits which impairs the vested right of petitioners to

be answerable, in a workmen's compensation proceeding, for such benefits only when there is a cause and effect relationship between the original injury, its sequelae and a subsequent death.

Another ground for complaint is the legislative act of imposing a liability where none existed before and to attempt to retrospectively accomplish this by a statute.

The general rule, which is almost unanimous in application and supported by most authorities, is that retrospective laws which create new obligations with respect to past transactions, by creating a substantive right or a fundamental cause of action where none existed before, come within the vale of invalidity; and indeed are presumptively so.

Application of Bailey, 37 NYS 2nd 275;
In Re Bailey, 40 NYS 2nd 746;
New Orleans v. *Clark,* 95 U.S. 644.

It is beyond question that the LHCA, prior to the 1972 amendments, did not afford a widow the right to death benefits in cases of permanent total disability when the individual afflicted with such disability died from causes not connected to that disability.

The 1972 amendments to the Act now provide for the payment of a death benefit to a widow in the instance in which the injured spouse who has been found to be permanently and totally disabled expires from causes not causally related to the disability.

In the instant matter the decedent was determined to be permanently and totally disabled at least as early as July 15, 1961. He died on October 14, 1973.

It is clear that the new right to death benefits was created by the 1972 amendments to the Act.

Thus where the effect of the statute is to create a right of action which did not previously exist, it is presumed that

the statute was intended to have only prospective application.

Jacobus v. *Colgate,* 217 NY 235;
McGee v. *International Life Insurance Company,* 355 U.S. 220; 78 S.Ct. 199.

"The presumption is very strong that a statute was not meant to act retrospectively and it ought never to receive such construction, if it is susceptible of any other. It ought not to receive such construction unless the words used are so clear, strong and imperative that no other meaning can be ascribed to them or unless the intention of the legislation cannot be otherwise satisfied. *Dash* v. *Van Kleeck,* 7 Johns 499; *Jackson* v. *Van Zandt,* 12 Johns 168; *United States* v. *Heth,* 3 Cranch; 359, 414; *Southwestern Coal Co.* v. *McBride,* 185 U.S. 499, 503; *United States* v. *American Sugar Co.,* 202 U.S. 563, 577."

United States Fidelity and Guaranty Company v. *United States For the Use and Benefit of Struthers Wells Company,* 209 U.S. 306, 310 (1907).

In that case the intent of Congress was gleaned from the wording of the statute and was grounded upon the utilization by Congress of the word "hereafter".

In the instant matter such term is not employed; but an expression of legislative intent may reasonably be inferred from the fact that Congress did not deem it necessary to amend at the same time two other portions of the Act, which have some relevance.

Section 902, paragraph 11, provides as follows:

" 'Death' as a basis for a right to compensation means only death resulting from injury."

That definition has been in the Act from its inception. It remains unchanged and consequently it is not unreasonable to conclude that for accidents occurring prior to the 1972 amendments the burden remains upon a claimant to establish a causal relation between injury and death before benefits are payable.

As some further evidence of the prospective application of the new death benefit is the fact that Section 903(A) of the Act although amended in part, continued the conditions precedent to recovery in a death case of a causal connection, by leaving untouched that portion of the Statute which reads as follows:

> "Compensation shall be payable under this Act in respect to disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States."

The new matter inserted merely expanded the definition of the term "navigable waters".

If indeed Congress had considered anything but a prospective application of Section 909 it would of necessity be required to further amend this Section and change the definition of death in Section 902.

Any contrary reading of the Statute would in effect result in a far reaching and revolutionary change in the entire concept of Workers Compensation Laws, in existence at the time of original injury in 1961.

The net effect would retroactively convert a Worker's Compensation Law into a life insurance and annuity scheme and place an intolerable burden on those employers and insurance carriers who never envisioned such responsibility or contracted to assume such.

When all these circumstances are considered it cannot be said that the rule enunciated in *United States Fidelity*

and Guaranty Company v. *Struthers Wells Company* (Supra), and followed in

> *Commander-Larabee Milling Company* v. *Manufacturers and Traders' Trust Company,* 61 F Supp. 341 (1945)

has been abrogated by the 1972 amendments.

The rule of construction that statutes are construed as prospective, in the absence of an unequivocal expression of contrary intent,

> *Graziano* v. *Donohue,* 33 AD 2 578 N.Y. (1969);
> *McKinney's Constitutional Laws,* Chapter 5, Statutes 51 Sub. C.,

applies equally to amendatory statutes.

In the instance of amendment the general rule is that such amendment will have no retroactive effect unless its language clearly indicates that it shall receive a contrary interpretation;

> *Benton* v. *Wickware,* 54 NY 2nd 226;
> *Kramer* v. *Tufany,* 35 AD 2nd 237 (1970).

The elimination of the petitioners' right not to answer for benefits retroactively imposed should not be countenanced.

> *Gramott* v. *Graves,* 255 App. Div. 255 (1938);
> *Application of Bailey,* 37 NYS 2d 275 (1942).

The cases relied upon by the Board and cited in its decision in

> *Rouse* v. *Norfolk, Baltimore et al.,* B.R.B. No. 75.101;
> 2 B.R.B. Service 11

are inapposite.

They are so by reason of the fact that although death claims were involved, in each case the death claim was

predicated upon the accidental injury which resulted in the respective deaths.

> *International Mercantile Marine Company* v. *Lowe*, 93 F 2d 663 (1938).

sets forth the proposition that a claim for death benefits based upon a cause and effect relationship between the original accident and subsequent death entitled a widow to the full award of benefits payable under the Act, i.e. $7,500.00, and such award could not be diminished by subtracting therefrom the sum of $6,375.00 representing the disability compensation paid to the decedent during his lifetime.

The Court in its decision noted that the right of the widow to benefits was predicated upon the Section 9 which provided in part

> "If the injury causes death the compensation shall be known as a death benefit."—

The obvious conclusion being that although there was a statutory limitation of $7,500.00 in benefits payable under the Act said limitation applied separately to disability and death claims. It was noted that the statute provided separate and distinct benefits for disability and death and separate and distinct limits in regard to the amount of payments for each.

In the death claim it was incumbent upon the widow to establish that the death was a consequence of the accident. In

> *Hampton Roads Stevedoring Corp.* v. *O'Hearne*, 184 Fed. Rep. 2d (1950),

a similar question was involved.

In the interim between this accident and death the LHCA was amended and allowable funeral benefits were increased. In addition the limitation of the total amount of compensation payable in a death case was removed.

The widow's cause of action for benefits was deemed to come within the purview of the amended statute.

Her right to benefits however was again conditioned upon the nexus between accident and death.

In

Travelers Insurance Company v. *Toner et al.*, 190 Fed. Rep. 2nd Series 30 (1951)

a similar situation prevailed. The court determined that the amount of benefits payable was governed by the law in existence at the time of death.

The right to benefits, however, was conditioned again upon the cause and effect relationship between the accident and death.

It is a far different proposition with which we are concerned in the instant case. Petitioners have no quarrel with the concept that death causally related to an accident creates a right of action in favor of a spouse. That is a principle that has been in existence from the very inception of Workers Compensation laws.

To pay benefits in the amount provided for on the day of death is curative and remedial in nature.

The creation to a new right to death benefits under the circumstances not heretofore known, however, represents a substantive change in the statute which cannot relate back to a time of injury when such right did not exist.

It is to that concept that our argument is directed.

In a recent case Dkt. # 75-4224 decided July 6, 1976, *American Stevedores et al.* v. *Vincent Salzano,* the constitutionality of retroactive provisions of the LHCA was considered and upheld, by this court. Again however the issue raised was an increase in benefits and not the creation of a new right of action. That case, therefore is in pari materia to those above cited in this brief, and is inapposite.

CONCLUSION

The decision and order of the Benefits Review Board should be reversed and the claim dismissed, with costs, to petitioners.

Dated Sept. , 1976.

Respectfully submitted,

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JOSEPH F. MANES,
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United States Court of Appeals
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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Charles Tynch, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 2189 Pitkin Avenue, Brooklyn, New York

That on September 1976, he served 3 copies of Brief

on

[illegible], Esq.,
189 Montague Street,
Brooklyn, New York,

Linda Carroll,
Department of labor,
Suite N 2716
N.D.O.L. Washington, D.C. 20210

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

Charles Tynch

Sworn to before me this
22nd day of September, 1976

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 1977